

Supreme Court No.126036

Court of Appeals No. 240790

Lower Court Case No. 00-724-CZ

STATE OF MICHIGAN
IN THE SUPREME COURT

BLACKHAWK DEVELOPMENT CORPORATION,
A Michigan corporation, DEXTER CROSSING, LLC,
A Michigan limited liability company

Plaintiffs/Appellants

vs.

VILLAGE OF DEXTER and DEXTER DEVELOPMENT,

Defendants/Appellees

REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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reply

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Defendants appear to reluctantly acknowledge that the grounds articulated by Plaintiffs in support of this Application, MCR 7.302(B) (2), (3) and (5), may “arguably pertain” to this Application. Compare Defendants Brief in Opposition at 7 with Plaintiffs’ Application for Leave at iii. However, Defendants misstate facts and law in an effort to dissuade this court from looking at what is really going on here: the invasion of one person’s property rights for the pecuniary benefit of another.

Contrary to the suggestion in Defendants Brief in Opposition, this case does not involve public improvements being made by a public entity to further a public purpose. Rather, it involves placing private improvements on Plaintiffs’ property solely as part of, and to serve, Defendants’ private commercial development on adjacent land. There is no substantive difference between what Mr. Kingsley seeks to accomplish on Mr. Bonar’s land from what Mr. Tolksdorf sought to accomplish on his neighbors’ land in *Tolksdorf v Griffith*, 464 Mich 1; 626 NW2d 163 (2001).¹ Mr. Kingsley attempts to bootstrap his way onto his neighbor’s property by way of an express easement, while Mr. Tolksdorf sought to do the same by way of the Private Roads Act. Either way is impermissible:

[The Act] gives one party an interest in land the party could not otherwise obtain. By eliminating the landowner's right to exclude others from his property, the act conveys an interest in private property from one private owner to another.

¹ Mr. Tolksdorf sought the government’s help in building one driveway and utilities across his neighbor’s land, while Mr. Kingsley seeks to build two driveways, sidewalks, lighting, utilities and landscaping on Mr. Bonar’s property. Mr. Tolksdorf had no other means to access and develop his property. The court of appeals found here, and the evidence is undisputed, that Kingsley’s development could proceed with access only to Dexter-Ann Arbor Road. See Application for Leave at 7-8, 26. Thus, unlike Mr. Tolksdorf’s landlocked property, access over the Blackhawk parcel is unnecessary to Mr. Kingsley’s development.

464 Mich at 10. In this case, Kingsley attempts to capture an interest he “could not otherwise obtain” by misconstruing an express easement limited by its very words to “improving Dan Hoey Road.” The dissenting opinion concisely demonstrates why Defendants’ argument lacks merit:

“Improving Dan Hoey Road” cannot be read to mean that the Village had the right to authorize the building of access roads, sidewalks, landscaping, lighting or the running of public utilities across land being unused by the Village for the sole purpose of developing the Dexter Commerce Center, a *private* development.

If the use of the easement is confined to the purposes for which it was granted, there is no question that the construction on plaintiff’s property was improper....None of the measures taken by defendants, even if required by the Village, would have been necessary for *any* reason were it not for the development of the Dexter Commerce Center.

Exhibit A to Application for Leave, Slip Op (dissent at 1-2)(emphasis in original).

Defendants claim on Plaintiffs’ property is premised on disjointed arguments:

Defendants assert that the easement gives them the right to make their private improvements, while arguing that the plain meaning of the words contained in the easement have no limitation and mean nothing in a purported “public easement” case.² Thus Defendants at once both rely, and do not rely, on the easement.

Moreover, Defendants argue, contrary to the testimony of their own witnesses, that the private benefit to Kingsley is only “incidental,” while at the same time asking this court to ignore “condemnation” cases, including apparently *Tolksdorf*, that articulate the standards that must be

² Defendants chastise Plaintiffs for looking at the actual words used in the easement; a process Defendants call “overly literal.” Defendants Brief in Opposition at 10. Defendants evade the maxim that written easements must be construed in accordance with their actual words, not other words that the parties, or the courts, believe should have been in the document. In this case, since the easement is unambiguous, the court of appeals majority should not have interpreted the easement in accordance with words that are not found within its four corners. See Application for Leave at 12-16. Defendants’ citation to so-called “public easement” cases is misplaced for the reasons stated in the Application for Leave at 17-20.

applied in determining the lawful extent of government assistance to private development. Faced with the impossible task of meeting these standards, Defendants simply ignore them.

Defendants, like the majority opinion below, simply presume the presence of a public purpose, when the overwhelming evidence proves otherwise. Janet Keller acknowledged that the proposed Kingsley access drives were not in furtherance of any public improvement of Dan Hoey Road. Keller dep at 83. She testified that the Village had no plans for any improvements in the area. Id. at 51-52, 80. See also Kingsley dep at 229, 237. Keller acknowledged that the driveways are solely for access to the commercial development, and serve no other purpose. Keller dep at 51-52, 83, 86. Although Janet Keller indicated that good planning principles would support access to Dan Hoey Road, she acknowledged that no studies were performed to determine whether or not the Kingsley development could be done safely without access to Dan Hoey Road, and that her “opinion” was merely a “guess”. Keller dep at 84, 100. Keller could think of no reason why the development could not go forward with just Dexter-Ann-Arbor access. Keller dep at 72-73. Kingsley acknowledged that he preferred more access to his property and benefited from the Dan Hoey accesses. Kingsley dep at 226-227, 228-229. See also Plaintiffs’ Application for Leave at 25-28.

Importantly, the trial court never addressed whether a public purpose existed. Instead, it found that the easement was ambiguous, a ruling reversed by the court of appeals (unanimously). At the very least, Plaintiffs are entitled to a trial on whether any public purpose exists here.

Defendants likewise make no attempt to muster even one case in support of their argument that the previously existing residential driveways provide legal basis for the two new access drives. Nor do Defendants attempt to distinguish, or even discuss, the caselaw to the contrary. The residential properties, as a matter of law, either had permissive use of the property

for their gravel drives, or at best had a easement by necessity that was extinguished when Kingsley assembled the land and obtained access for all of it to Dexter-Ann Arbor Road. See Plaintiffs' Application for Leave at 28-29.³

Defendants' brief takes liberty with the factual record. Defendants misstate numerous facts and make numerous unsupported statements. In fact, there are numerous statements averred in the Counter-Statement of Facts that have no citation to the record whatsoever, contrary to MCR 7.212(D)(3)(b).

For example, Defendants argue, without citation to the record, that the Village of Dexter "required [Kingsley] to construct underground utilities, public sidewalks, street lighting, and a public access road on the easement." Defendants Brief in Opposition at 8. The Village did not require that Defendant make these improvements, or that he make them on the disputed property. Rather, the Village indicated only that, if Kingsley were to build the center access drive to Dan Hoey, that it align with the drive across Dan Hoey. See Plaintiffs' Application for Leave at 7-8.⁴

Defendants imply that the original declaration of taking which led to the establishment of the easement somehow contemplated future commercial improvements on the Blackhawk parcel. Yet the only public purpose identified in the resolution was to improve the "public safety and welfare" by the "reconstruction of the badly-deteriorated and unsafe easterly half of Dan Hoey Road." See Application for Leave, Exhibit D.

Defendants quote extensively from the deposition from the outside planning consultant to the Village, Ken Detloff, in an attempt to show a need and public purpose for violating

³ See also *Tolksdorf*, 464 Mich at 4. In *Tolksdorf*, the neighbors had historically granted access to the landlocked property to the general public via trails for recreational use and also provided access for loggers, but objected to Mr. Tolksdorf's proposed driveway and utilities.

⁴ Defendants conveniently overlook their prior counsel's role in devising the "public improvement" strategy as a way to get around the Village's requirement that Kingsley actually own the land upon which his improvements are built. See Application for Leave at 4-5.

Blackhawk's property rights. Yet Defendants fail to inform the court that Mr. Detloff's opinions were all based on the assumption that Kingsley would gain control of the parcel prior to building his improvements. See Detloff Deposition at 14-16, 20, attached hereto as Exhibit O ("Q: Is it fair to say that your company undertook its analysis moving forward on the assumption that Mr. Kingsley somehow would come in control of that property he needed for his access roads? A: Yes." Id at 20). Assuming Kingsley obtained control of the property, it was his view that the proposed center drive align to the drive across Dan Hoey. Id. at 13. Like Janet Keller, the Village zoning officer, Detloff indicated that the Kingsley project could go forward without Dan Hoey access, but would have to be redesigned. Id. at 17-18, 22.

Defendants mislead this court by unequivocally stating that the center drive is being constructed "to public road design standards", citing the Village's outside consulting engineer's deposition in support. Defendants Brief in Opposition at 5, citing Westover dep at 19. Westover only stated that he "believes" the drive will meet public road standards. Defendants know he is wrong. The Village planner, in a written memorandum, indicated that the access drive did not meet public road standards. See Application for Leave, Exhibit M, 11/18/99 McKenna Memorandum p. 2, 5. Further, the Village zoning officer testified, and Mr. Kingsley acknowledged, that the entrances were designed to commercial entry standards. Keller dep at 76; Kingsley dep at 164.

These examples of some of the misstatements contained in Defendants' Brief in Opposition demonstrate that Defendants factual basis for their argument is untrustworthy.

Finally, Defendants' argument that Blackhawk is not being harmed and, therefore, has no basis to complain ignores the fundamental nature of property rights. Property rights do not automatically change hands because one person has a better use than another for the property at

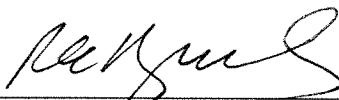
issue. The Michigan Supreme Court in *Tolksdorf* recognized this, specifically noting that the act involved in that case infringed upon the fundamental right to exclude others from one's property: "By eliminating the landowner's right to exclude others from his property, the act conveys an interest in private property from one private owner to another." 464 Mich at 10. It is not Blackhawk's burden to demonstrate that it has a better use for its own property than its neighbor, Kingsley.

If the Village decides in the future to undertake construction for the purpose of "improving Dan Hoey Road," then the easement would have application. But it does not have any lawful application to this case. The easement simply serves as a pretext for allowing a private developer to benefit his private development by invading the property rights of his neighbor.

Plaintiffs request that this court grant leave to appeal or, in the alternative, reverse the court of appeals based on the reasoning and conclusions of the dissent, grant summary disposition in favor of Plaintiffs and remand to allow Plaintiffs to pursue their claims for injunction and damages. Application for Leave, Exhibit A, Slip Op Dissent at 2.

Respectfully submitted,

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